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In The

Supreme Court of the United States

MICHAEL W. SOLE, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,

Petitioners,

v.

T.A. WYNER, GEORGE SIMON,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA, 23 OTHER STATES, AND PUERTO RICO AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff who obtains a preliminary injunction but does not prevail on the merits should be considered a "prevailing party" under 42 U.S.C. § 1988.

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INTERESTS OF AMICI

The States must regularly defend themselves in court against a wide array of claims, many of which involve attorney fee shifting statutes such as 42 U.S.C. § 1988. The case at bar presents a scenario that frequently occurs for the States: a court grants a preliminary injunction, but, following a trial on the merits, the state statute, regulation or official action is ultimately vindicated. Awarding attorneys' fees to a plaintiff who obtains a preliminary injunction and nothing else would cause a considerable drain on the States' public purse. For smaller governmental units within a State, awarding attorneys' fees for a preliminary injunction could amount to a substantial portion of their budget. Moreover, States face tremendous fiscal pressure as they seek to provide adequate funding for education, law enforcement, health care, roads and other core services. The States have a strong interest in reducing the costs associated with unmeritorious lawsuits and in freeing such resources for more deserving ends. States also have a duty to ensure that their laws are faithfully observed. If a plaintiff can recover attorneys' fees for a preliminary injunction, even in a case that is ultimately determined to be without merit, States and local governments would face costly disincentives to enforce their laws.

The States urge this Court to reverse the judgment below and to reaffirm that a plaintiff cannot recover attorneys' fees unless the plaintiff has prevailed on the merits or has obtained a court-ordered consent decree.

SUMMARY OF ARGUMENT

Under 42 U.S.C. § 1988, a "prevailing" plaintiff is entitled to attorneys' fees. Under the plain language of this

provision, a plaintiff cannot be said to have "prevailed" when the plaintiff has failed to achieve victory on the merits. This Court's precedents confirm that preliminary victories do not suffice to make a plaintiff a "prevailing party" if these initial victories are not followed by a favorable resolution of the merits of the case. Preliminary injunctions, by definition, do not constitute relief on the merits. While a court examines the *anticipated* merits of a plaintiff's claim in deciding whether to grant a preliminary injunction, this proceeding does not resolve the actual merits of a claim or lawsuit. When the balance of harms weighs heavily in a plaintiff's favor, as it often does, the value of the merits analysis at the preliminary injunction stage is further diminished. Moreover, during the course of litigation, a plaintiff may secure a favorable disposition in a number of preliminary contexts, such as discovery, class certification or summary judgment. Unless these initial successes translate into a favorable resolution of the underlying merit of a claim or claims, a plaintiff will not qualify as a "prevailing party."

This Court has stated that attorneys' fees are proper if the plaintiff has prevailed on a "significant issue" or has obtained a "material alteration of the parties' legal relationship." An examination of this Court's jurisprudence as a whole, rather than selected phrases viewed in isolation, shows that obtaining a preliminary injunction, without more, does not meet either of those two standards. The legislative history of § 1988 confirms that plaintiffs should not be awarded attorneys' fees in this situation. Congress enacted the statute to ensure that wronged citizens would be able to obtain a vindication of their rights. In the case at bar, the lower courts held that the plaintiffs' rights were *not* violated.

Finally, some courts of appeals have incorrectly awarded attorneys' fees to certain plaintiffs who obtained a preliminary injunction but whose action later became moot. These courts justify the award of attorneys' fees on the basis that the preliminary injunction allowed the plaintiff to accomplish one of the goals of the litigation, or because the preliminary injunction prompted a change in the plaintiff's favor. First, these decisions cannot be reconciled with this court's cases. These decisions have the effect of resurrecting the "catalyst" theory this Court recently buried. Moreover, this Court has previously held that a lawsuit's mootness prior to the resolution of the merits will not entitle a plaintiff to attorneys' fees. In addition, the uncertainty associated with awarding attorneys' fees for some preliminary injunctions but not for others would have the undesirable effect of causing significant litigation on the collateral issue of attorneys' fees. If a plaintiff succeeds in obtaining relief on the merits, attorneys' fees should follow. Where a plaintiff has failed to obtain a favorable resolution of the underlying merits, a preliminary injunction affords no basis to award attorneys' fees.

ARGUMENT

I. A PLAINTIFF WHO OBTAINS A PRELIMINARY INJUNCTION BUT ULTIMATELY LOSES THE CASE ON THE MERITS IS NOT A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

A. The Plain Meaning of the Term "Prevailing Party" Precludes a Recovery of Attorneys' Fees When the Plaintiff Loses on all of His Claims.

1. The Common, Ordinary Understanding of the Term "Prevailing Party" Requires Ultimate Victory, Not Success That Is Limited to a Preliminary Stage of Litigation.

The applicable statute, 42 U.S.C. § 1988(b), provides in relevant part that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs. . . ." The term "prevailing party" has a "rather clear meaning." *Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 607 (2001). To prevail, whether in the realm of sports, politics, armed conflict, or law, entails more than a preliminary victory that is followed by ultimate defeat.

Definitions from legal dictionaries in use in 1976, when § 1988 was enacted, confirm that a party's success in a preliminary round of litigation does not by itself render a party a "prevailing party." For example, BLACK'S LAW DICTIONARY 1352 (4th ed. 1968), provided the following definitions of "prevailing party": (1) "That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, even though not prevailing

on the main issue even though not to the extent of his original contention"; (2) "The one in whose favor the decision or verdict is rendered and judgment is entered"; (3) "The party ultimately prevailing when the matter is finally set at rest"; (4) "*To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.*" *Id.* (emphasis added).[1] Similarly, BALLENTINE'S LAW DICTIONARY 985 (3rd ed. 1969), stated that "[t]o be a prevailing party does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it. If he has, he is a prevailing party." *Id. See also* BOUVIER'S LAW DICTIONARY 973 (Baldwin's student ed. 1934) (same).

In *Buckhannon*, this Court cited the definition from BLACK'S LAW DICTIONARY 1145 (7th ed. 1999), that defines a "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorneys' fees to the prevailing party). – Also termed successful party." *Buckhannon*, 532 U.S. at 603. This definition is entirely consistent with the definitions cited above that were in existence at the time of the drafting of § 1988.

In both contemporary parlance and at the time of the enactment of § 1988, the term "prevailing party" does not include success during a preliminary round that is

[1] The following edition of Black's Law Dictionary retained this definition. BLACK'S LAW DICTIONARY 1069 (5th ed. 1979).

followed by ultimate defeat. The plaintiffs in the case at bar lost the merits of their suit. Therefore, they cannot be considered "prevailing parties" and cannot obtain attorneys' fees.

2. This Court's Jurisprudence Confirms That a Plaintiff Who Wins at a Preliminary Stage Is Not Entitled to Attorneys' Fees if the Plaintiff Does Not Obtain a Favorable Resolution of the Merits.

This Court's decisions have adhered to the understanding that a party has not prevailed when an initial victory is followed by defeat on the merits. In *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the lawsuit arose out of a fatal shootout between members of the Black Panther Party and Chicago police. *Hanrahan,* 446 at 755 n.1. The district court directed a verdict for the government officials, but the court of appeals reversed and remanded the case back to the district court for a new trial. *Id.* at 753. The court of appeals also awarded the plaintiffs attorneys' fees for their successful appeal. *Id.* This Court granted certiorari and reversed. This Court noted that Congress contemplated the award of fees *pendente lite* in some cases. *Id.* at 757. However, to qualify for such an interlocutory award, a party must "establish[] his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Id.* Because the plaintiffs had not yet prevailed on the merits of their claims, this Court held, the court of appeals improperly awarded attorneys' fees. *Id.* at 758-59. This Court noted that, on remand, should the jury decide in a manner

adverse to the plaintiffs' claims, "it could not seriously be contended that the respondents had prevailed." *Id.* at 759.

This Court revisited the issue in *Hewitt v. Helms*, 482 U.S. 755 (1987), framing the issue in terms that are strikingly apposite to the case at bar: "whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorneys' fees." *Id.* at 757. The inmate plaintiff in *Hewitt,* Aaron Helms, filed an action under § 1983, alleging that the use of hearsay at a prison disciplinary hearing and the delay in resolving misconduct allegations against him violated his constitutional rights. *Id.* Six months after Helms was released, the district court entered summary judgment in favor of the government without addressing the issue of qualified immunity. *Id.* at 757-58. The court of appeals reversed, concluding that Helms had been denied his constitutional right to due process. The court of appeals remanded the case to the district court, instructing it to enter summary judgment in favor of the inmate on his constitutional claims unless the government officials could establish an immunity defense. *Id.* at 758. On remand, the district court concluded that the officials benefited from qualified immunity and granted summary judgment in their favor. The district court denied Helms' motion for attorneys' fees, concluding he was not a "prevailing party." *Id.* at 759. The court of appeals reversed, awarding attorneys' fees based on its prior decision that Helms' constitutional rights had been violated. *Id.*

This Court vacated the award of attorneys' fees, concluding that Helms was not a "prevailing party." *Id.* at 759-60. The Court observed that a party must "receive at least some relief on the merits of his claim before he can

be said to prevail." *Id.* at 760. Helms had obtained neither damages, injunctive relief nor any declaratory judgment, nor had he received relief without benefit of a formal judgment such as a consent decree or a settlement. *Id.* at 760. This Court further held that the fact that Helms had obtained a favorable judgment on appeal did not make him a prevailing party, *id.*, and concluded that Helms' initial success on appeal could not be analogized to success in a declaratory judgment action because the district court was left to determine whether the plaintiff ultimately should be awarded any relief. *Id.* at 760. This Court reasoned that "[t]he most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made." *Id.* at 760. In sum, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' Any other result strains both the statutory language and common sense." *Id.* at 763.

A federal court reviewing a request for attorneys' fees need not parcel out who prevailed during the various stages of litigation. Instead, "the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits." *Kentucky v. Graham*, 473 U.S. 159, 164 (1985). That is because "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Id.* at 165. "Section 1988 simply does not create fee liability where merits liability is nonexistent." *Id.* at 168. As this Court noted in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685

(1983), "ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it."

3. A Preliminary Injunction Does Not Constitute Relief on the Merits.

In its decision below, the Eleventh Circuit concluded that the preliminary injunction "decided a substantive issue . . . and thus was [a decision] on the merits." *Pet. App.* 3a. This conclusion was incorrect, for two reasons. First, when considering an application for a preliminary injunction, a trial court weighs the *anticipated* merits of the plaintiff's case, not the merits proper. At this stage of litigation, a trial court is simply not in a position to resolve the underlying merits of the case. Second, the merits inquiry is diluted by the balancing of harms. Consequently, a preliminary injunction cannot be equated with "relief on the merits" for purposes of determining whether a plaintiff is a "prevailing party."

Federal Rule of Civil Procedure 65 does not articulate a standard for preliminary injunctions. However, the "federal circuit courts are largely in agreement as to the substance of the standard that generally governs the issuance of a preliminary injunction." Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 111 (2001). Courts consider the following factors:

> (1) the moving party's likelihood of success on the merits; (2) irreparable harm to the moving party if the preliminary injunction is improperly denied; (3) irreparable harm to the non-moving

> party if the preliminary injunction is improperly granted; and (4) the "public interest."

Id. (citing cases).

From these factors, it is apparent that preliminary injunctions, which are, by definition, preliminary, do not actually resolve the merits of the underlying dispute.[2] Instead, a preliminary injunction serves a "limited purpose" which is to "merely preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *See also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947 (2d ed. 1992) ("[A] preliminary injunction is an injunction to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."). Moreover, because the object of a preliminary injunction is merely to freeze the status quo and to prevent irreparable harm until the dispute can be resolved, it does not change the "relationship of the parties" in the sense that this Court has understood the concept.

To be sure, one factor a trial court considers in adjudicating a motion for a preliminary injunction is the anticipated merit of the plaintiff's claims. However, as the Fourth Circuit noted in *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002), "the merits inquiry in the preliminary

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[2] Of course, under Fed. R. Civ. P. 65(a)(2), a court can grant permanent relief when it consolidates the preliminary injunction hearing with a resolution of the merits of the case. This circumstance only strengthens the States' argument that a preliminary injunction, standing alone, does not constitute the sort of "relief on the merits" contemplated by this Court's decisions.

injunction context is necessarily abbreviated." The trial court considering the request for a preliminary injunction must essentially make a prediction of a probable outcome, based on a rudimentary hearing. This initial assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached. Therefore, the granting of a preliminary injunction "by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the injunction." *Id.*

Moreover, as the Fourth Circuit noted in *Smyth*, the inquiry into the merits of the case is further reduced in the context of a preliminary injunction because, in addition to assessing the anticipated merits of a claim, the trial court must also weigh the balancing of likely harms. *Id. See also Yakus v. United States*, 321 U.S. 414, 440 (1944) (the granting of a preliminary injunction turns on the "balance [] [of] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction."). This balancing, in many contexts, will outweigh any assessment of the merits of the allegations. For example, in *Smyth*, the plaintiff sought to avoid the termination of welfare benefits, a circumstance that would strongly incline a court to grant a preliminary injunction irrespective of the trial court's assessment of the underlying merit of the allegations. *Smyth*, 282 F.3d at 271. In environmental cases, a preliminary injunction will issue with great frequency to prevent irreparable harm. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be remedied by money

damages and is often permanent or at least of long duration, *i.e.,* irreparable."). In the case at bar, the district court stressed that the potential injury to the plaintiffs far exceeded any harm to the defendants. *Pet. App.* 15a. Thus, trial courts considering preliminary injunctions are not engaged in a pure merits inquiry. Some courts expressly dilute the merits inquiry if the balance of hardships tips decidedly in favor of the moving party. *See, e.g., Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995). In that circumstance, those courts require that the plaintiff raise only "sufficiently serious questions going to the merits." *Id.* This balancing of interests, while necessary for the granting of a preliminary injunction, does not constitute the sort of relief on the merits this Court has required for a plaintiff to be considered a "prevailing party."

Certainly, a preliminary injunction is an enforceable order – as are orders resolving discovery motions, standing issues, abstention doctrines, class certifications, motions to dismiss or summary judgment motions. For that matter, an erroneous trial court judgment that is later reversed on appeal, as occurred in *Hewitt* and *Hanrahan,* is also temporarily binding. Success on such matters may advance the plaintiff's cause in some fashion, but preliminary victories of this sort do not permit an award of attorneys' fees if they are not followed by a favorable resolution of the merits. A preliminary injunction, in short, "is not the stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760. Before a plaintiff can be said to "prevail," "respect for ordinary language requires that [he] receive at least some relief *on the merits* of his claim." *Buckhannon,* at 604 (emphasis added).

4. A Plaintiff Who Obtains a Preliminary Injunction But Ultimately Loses the Case Has Not Prevailed on any "Significant Issue" or Obtained a "Material Alteration of the Parties' Legal Relationship."

In a number of instances, this Court has noted that a plaintiff who has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit" will be entitled to reasonable attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Texas State Teachers Ass'n v. Garland Indep. Sch. District*, 489 U.S. 782, 789 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In opposing certiorari, the respondents contended that in obtaining the preliminary injunction, they succeeded on a "significant issue." *Br. in Opp.* at 3-4. The respondents also relied on this Court's statements that a plaintiff is a "prevailing party" if he has obtained a "material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. at 111. *See also Garland*, 489 U.S. at 792-93. According to the respondents, their success in obtaining a preliminary injunction materially altered their relationship with the park officials. *Br. in Opp.* at 5-8. An examination of this Court's jurisprudence, rather than isolated statements, shows that the fleeting victory obtained by the plaintiffs here does not satisfy the "significant issue" or "material alteration" standards.

In *Hensley*, mental patients who were involuntarily confined in a state hospital filed an action against the State. 461 U.S. at 426. The lawsuit (1) challenged the constitutionality of treatment and conditions; (2) challenged the placement of certain patients without procedural due process protections; and (3) sought

compensation for the patients' work at the hospital. *Id.* Issue (2) was resolved by consent decree and issue (3) became moot when Congress enacted the Fair Labor Standards Act. *Id.* at 426-27. The remaining issue proceeded to trial and the district court found a number of constitutional violations. *Id.* at 427. The lower courts awarded the plaintiffs' attorneys' fees on all of their claims, including the hours spent in pursuit of the unsuccessful claims. *Id.* at 428.

This Court began its analysis by noting a typical "generous formulation" from the lower courts concerning when plaintiffs may be considered prevailing parties: "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433. This Court concluded that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Id.* at 439. This Court held that the plaintiffs were entitled to attorneys' fees, but only to the extent the fees related to the successful claim. *Id.* at 440.

While *Hensley* said that a plaintiff who had prevailed on a "significant issue" could recover attorneys' fees, the context strongly suggests that this Court meant a final resolution of a claim in the plaintiff's favor. The opinion reflects that the "significant issue" on which the *Hensley* plaintiffs had prevailed was the successful litigation to finality of one of their claims – not merely a preliminary or a collateral issue.

Garland confirmed that prevailing on a "significant issue" or obtaining a "material alteration" of the parties' legal relationship are concepts synonymous with a favorable final resolution of the merits of the allegations. In *Garland*, this Court granted certiorari to review the validity of a test a number of circuits had developed to determine whether a plaintiff was a "prevailing party" under § 1988. Those lower courts required "that a party succeed on the 'central issue' in the litigation and achieve the 'primary relief sought' to be eligible for an award of attorneys' fees under § 1988." *Id.* at 784. The plaintiff schoolteachers in *Garland* had challenged several aspects of school policy relating to teachers' interaction with, and discussion of, teachers' unions. *Id.* at 785. The district court rejected the teachers' claims in nearly all respects but granted relief on one minor claim. *Id.* at 786. On appeal, the court of appeals held that several aspects of school policy violated the teachers' First Amendment rights. *Id.* at 786-87. The school district appealed to this Court, which summarily affirmed the judgment of the court of appeals. *Id.* at 787. In spite of this successful resolution of some of their claims, the lower courts concluded the plaintiffs were not "prevailing parties" because they had not "carried the 'central issue' in the lawsuit nor achieved 'the primary relief sought.'" *Id.*

This Court rejected such a restrictive reading of § 1988. *Id.* at 793. The Court held that to be a prevailing party, a plaintiff must have "succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit.'" *Id.* at 791-92 (emphasis added). "At a minimum," the Court noted, "the plaintiff must be able to point to *a resolution* of the dispute which changes the legal relationship between itself and

the defendant." *Id.* at 792 (emphasis added). Reviewing the legislative history of § 1988, this Court concluded that Congress contemplated "interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" *Id.* at 790 (citing S. Rep. No. 94-1011, 94th Cong. 2d Sess. at 5 (1976)). This Court observed that when it summarily affirmed the court of appeals' decision in favor of some of the plaintiffs' constitutional claims, it effectively ended the litigation on these claims. As to those claims, brought to final resolution, the plaintiffs would be entitled to some fee award for their success, even if other issues had been remanded for further proceedings. *Id.* at 790-91. The "central issue" test could not be reconciled with this congressional intent to award interim fees in such circumstances. *Id.* This Court concluded that

> [t]he touchstone of the prevailing party inquiry must be the *material alteration* of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Id. at 792-93 (emphasis added).

More recently, in *Farrar*, this Court again addressed what it takes to "materially alter the relationship between the parties" and what a plaintiff must accomplish to succeed on a "significant issue." In that case, the plaintiff, Joseph Farrar, sought $17 million in damages against various public officials based on an alleged conspiracy to illegally close a school he operated. He eventually obtained a nominal damages award. *Farrar*, 506 U.S. at 106-07.

The district court awarded Farrar attorneys' fees but was reversed by the court of appeals on the basis that Farrar was not a "prevailing party." *Id.*

After reviewing its past decisions, this Court first held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* at 112. A material alteration of the parties' relations has occurred when the plaintiff "becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Because "[a] plaintiff may demand payment for nominal damages no less than" an award of millions of dollars in compensatory damages, a material alteration of the legal relationship between the parties has taken place. *Id.* Nevertheless, this Court went on to hold that obtaining nominal damages under the circumstances of that case did not qualify the plaintiff for any award of attorneys' fees. *Id.* at 115. The degree of Farrar's success was so limited in relation to the object sought by the litigation that the court below properly vacated the district court's award of attorneys' fees. *Id.* at 114-15. This Court's discussion of "material alteration" and the requirement that a plaintiff obtain "some success" once again occurred in the context of a final resolution of one of the claims in favor of one party and against another.

This Court's jurisprudence shows unmistakably that the respondents in the case at bar did not obtain a "material alteration of the parties relationship" and did not prevail on a "significant issue" because they never obtained relief on the merits of their underlying claims.

B. The Legislative History Confirms That Congress Enacted § 1988 to Help Plaintiffs Whose Civil Rights Had Actually Been Violated.

Congress enacted § 1988 in response to this Court's decision in *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). *See Hensley*, 461 U.S. at 429. The plaintiffs in *Alyeska* sought to block the construction of the trans-Alaska oil pipeline, but their lawsuit was ultimately mooted by federal legislation. *Alyeska*, 421 U.S. at 244-45. Nevertheless, the court of appeals concluded that the plaintiffs had performed an important public service and awarded them attorneys' fees under a "private attorney general" theory. *Id.* at 245-46.

This Court, upon review of the historical principles that animated fee-shifting, reversed the court of appeals. The Court noted that the longstanding practice under the "American Rule" was that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The Court contrasted the practice under the American Rule with the way attorneys' fee awards developed in England. There, the Court noted, "counsel fees are regularly awarded to the prevailing party." *Id.* at 247. The Court observed that, as early as 1796, its practice was to adhere to the American Rule absent congressional action. *Id.* at 249. The Court declined to fashion a "far reaching exception" to the American Rule because doing so would "make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 247, 269. The importance of the policy issues underlying a particular statute did not warrant "jettison[ing] the traditional rule against nonstatutory allowances to the prevailing party." *Id.* at 263.

Following *Alyeska*, a plaintiff who prevailed in a civil rights action would not be entitled to attorneys' fees. Recognizing that this would deter many meritorious lawsuits by plaintiffs who could not afford to hire attorneys, Congress promptly enacted § 1988. The legislative history is clear that Congress sought to ensure that plaintiffs whose rights *have actually been violated* are able to vindicate those rights in court because such plaintiffs would be able to obtain the assistance of counsel. There is no support in the legislative history for the proposition that a plaintiff whose rights have not been violated, but who wins a preliminary battle in the course of litigation, is entitled to attorneys' fees.

For example, the report from the House Judiciary Committee for the legislation that became § 1988 notes that "[i]n many instances where [civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 94-1558, 94th Cong. 2d Sess. at 1 (1976). "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." *Id.* The examples provided in the report support the conclusion that Congress was concerned with court access for persons who are actual victims, rather than imagined victims, of civil rights abuses. *Id.* at 6. The report of the Senate Judiciary Committee expressed the same concerns. S. Rep. No. 94-1011, at 2 (1976) (attorney fee provisions necessary to ensure that "those who violate the Nation's fundamental laws" do not "proceed with impunity."). Like the House, the Senate sought to ensure that plaintiffs who had vindicated their rights could obtain attorneys' fees. *Id.* at 5. This legislative history shows that a "prevailing party" was one who had

established a violation, or a threatened violation, of a right and not an imagined violation.[3]

Congress had no intention of providing incentives for plaintiffs to file meritless lawsuits or to encourage litigation for its own sake. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) ("when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violation of federal law."). *Cf. Hensley*, 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (noting that § 1988 was not meant to serve as a "'relief fund for lawyers.'") (quoting 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Kennedy)). Consistent with this legislative intent, this Court should confirm that plaintiffs who are ultimately vindicated should receive their reasonable attorneys' fees under § 1988; those who file lawsuits without prevailing on the merits should receive no fee award.

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[3] The debates in the House and Senate only confirm this understanding. 122 Cong. Rec. 31,171 (1976) ("Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights.") (remarks of Sen. Scott); *id.* at 31,472 (legislation needed to ensure plaintiffs can "vindicate basic human rights") (remarks of Sen. Kennedy); *id.* at 31,832 (attorneys' fees needed to ensure the "violation of fundamental human rights does not go unchallenged") (remarks of Sen. Hathaway); *id.* at 33,313 (equal access to courts needed "to vindicate congressional policies and enforce the law") (remarks of Sen. Tunney); *id.* at 35,126 ("If Federal laws providing for the protection of civil and constitutional rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees.") (statement of Rep. Drinan); *id.* at 35,127 (remedy needed to ensure "the availability of justice" for those who have been "deprived of their civil rights") (remarks of Rep. Holtzman); *id.* at 35,128 (legislation needed because "[m]ost Americans . . . cannot afford to hire a lawyer if their constitutional rights are violated or if they are the victims of illegal discrimination.") (remarks of Rep. Seiberling).

II. EVEN WHEN THE CASE BECOMES MOOT AFTER A PRELIMINARY INJUNCTION IS GRANTED, A PLAINTIFF IS NOT ENTITLED TO ATTORNEYS' FEES UNLESS HE ALSO OBTAINS A FAVORABLE RESOLUTION OF THE MERITS.

Some courts of appeals have concluded that a plaintiff who has obtained a preliminary injunction might be entitled to attorneys' fees if mootness has precluded the resolution of the merits of the dispute. These courts have devised a variety of tests to determine when such plaintiffs should receive attorneys' fees. For example, in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), the District of Columbia Circuit held that the plaintiffs were prevailing parties because their preliminary injunction prompted the Secretary of the Department of Agriculture to issue a new regulation that rendered the case moot. *Id.* at 943. In the court of appeals' view, the plaintiffs were prevailing parties because their lawsuit "caused a substantial change in the legal relationship between the parties and provided plaintiffs with concrete and irreversible relief." *Id.* at 946. Similarly, in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), the plaintiff obtained a preliminary injunction that excluded a report from a disciplinary hearing. Once the hearing took place, the issue became moot. *Id.* at 1095-96.

The fact that a case becomes moot following the preliminary injunction does not afford the court a basis to award attorneys' fees. Plaintiffs who have not established that their rights were, in fact, violated, should not receive attorneys' fees. If attorneys' fees are unwarranted when a plaintiff receives a favorable judgment on the merits *after* the case has become moot, *Rhodes v. Stewart*, 488 U.S. 1, 4

(1988) (*per curiam*), then *a fortiori* a plaintiff is not entitled to attorneys' fees when the case becomes moot *without any* final resolution of the merits. In addition, the fact that a defendant's actions render a case moot, either in reaction to the lawsuit or for other reasons altogether, does not by itself entitle a plaintiff to attorneys' fees. In *Buckhannon,* 532 U.S. at 605-06, this Court rejected the notion that a plaintiff should receive attorneys' fees because the plaintiff's lawsuit functioned as a "catalyst" for the defendant's actions.

Those lower courts that award attorneys' fees in cases that become moot following the preliminary injunction do not automatically award attorneys' fees in such situations. Rather, the award of attorneys' fees is limited to those plaintiffs who satisfy a particular legal test. *See, e.g.*, *Select Milk Producers, Inc.*, 400 F.3d at 946; *Watson*, 300 F.3d at 1095-96. If this Court were to adopt such a rule, regardless of its precise contours, plaintiffs will undoubtedly try to fit their facts into the strictures of the test and defendants will have an obvious incentive to object. Protracted litigation on the issue of attorneys' fees will be sure to follow. The Court has stressed that "[a] request for attorneys' fees should not result in a second major litigation" and has therefore "avoided an interpretation of the fee-shifting statutes that would have 'spawned a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (citations omitted). In contrast, determining which party has prevailed on the merits of a claim is not a difficult inquiry.

The rule should be straightforward – to be a "prevailing party" under 42 U.S.C. § 1988, a plaintiff must

prevail on the merits of at least one of his claims.[4] A preliminary injunction, like initial success on appeal, does not qualify when a plaintiff's initial success is followed by an adverse result or by mootness.

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[4] By "ultimate resolution" the States do not suggest that the litigation must be concluded in its entirety. If a plaintiff prevails on the merits of a discrete claim before the overall litigation concludes, as in *Hanrahan,* the plaintiff could obtain *pendente lite* attorneys' fees for the claim on which he had prevailed. *Hanrahan*, 446 U.S. at 757. Furthermore, the States do not question that a plaintiff who has obtained a court-ordered consent decree is a prevailing party entitled to attorneys' fees. *Buckhannon*, 532 U.S. at 605.

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Eleventh Circuit should be **REVERSED**.

Respectfully submitted,

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